Supreme Court, U.S.
FILED

94 760 OCT 24 1994

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JAMES P. LeDONNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

SHELLY B. KULWIN
Counsel of Record
MICHAEL C. BENNETT
KULWIN & ASSOCIATES
333 West Wacker Drive
Suite 2860
Chicago, Illinois 60606
(312) 641-0300
Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

64 pp

QUESTION PRESENTED

1. Whether the Seventh Circuit substantially departed from the long established "totality of the circumstances" standard it developed pursuant to *McCarthy v. United States* in holding that James P. LeDonne knowingly and voluntarily pled guilty to complex bank and wire fraud charges on the grounds that he had a college education, read the charges, spoke with his attorney outside of court about the charges and answered "yes" when asked if he was guilty of the charged crimes, while acknowledging that the district court, the government and his attorney inaccurately explained those charges to LeDonne and that LeDonne never expressed any understanding during the plea proceedings of those charged crimes?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
1. INTRODUCTION	3
2. FACTUAL AND PROCEDURAL BACKGROUND	5
(a) District Court Proceedings	5
(b) Motion to Withdraw	8
(c) The Decision Below	9
REASONS FOR GRANTING THE WRIT OF CERTIORARI	10
A.	
THIS CASE RAISES IMPORTANT QUESTIONS ABOUT WHETHER A TRIAL COURT CAN FIND THAT A DEFENDANT TRULY ENTERED A KNOWING AND VOLUNTARY PLEA OF GUILTY WHERE HE ADMITTEDLY WAS MISINFORMED ABOUT THE NATURE OF THE CHARGES AGAINST HIM AND NEVER EXPRESSED ANY UNDERSTANDING OF THOSE CHARGES AT THE PLEA PROCEEDING	11

B.

THIS CASE RAISES IMPORTANT QUESTIONS ABOUT THE EXTENT TO WHICH A DISTRICT COURT CAN RELY UPON OTHER INDICIA TO ESTABLISH A DEFENDANT'S UNDERSTANDING OF CHARGES TO WHICH HE IS PLEADING GUILTY WHERE HE WAS MISINFORMED ABOUT THE NATURE OF THOSE CHARGES AND NEVER TESTIFIED TO HIS UNDERSTANDING OF THOSE CHARGES 15

1. Reliance Upon A Government Proffer ... 16

2. Mere Reading Of The Charging Information . 18

3. Out-Of Court Proceedings 19

CONCLUSION 21

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

CASES	PAGE
Key v. United States, 806 F.2d 133 (7th Cir. 1986)	14, 15
McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)	*passim*
United States v. Boatright, 588 F.2d 471 (5th Cir. 1979)	12, 13
United States v. Darling, 766 F.2d 1095 (7th Cir. 1985)	19, 20
United States v. Fountain, 777 F.2d 351 (7th Cir. 1985)	4, 14, 15, 19, 20
United States v. Ivory, 11 F.3d 1411 (7th Cir. 1993)	16, 17
United States v. Leung, 783 F.Supp. 357 (N.D.Ill. 1992)	14, 15
United States v. Musa, 946 F.2d 1297 (7th Cir. 1991)	4, 16, 17
United States v. Ray, 828 F.2d 399 (7th Cir. 1987)	4, 16, 17, 18, 19
United States v. Seybold, 979 F.2d 582 (7th Cir. 1992)	4
United States v. Syal, 963 F.2d 900 (6th Cir. 1992)	12, 13
United States v. Wetterlin, 583 F.2d 350 (7th Cir. 1978)	18, 19, 20

STATUTES	
18 U.S.C. § 1343	2, 3, 5
18 U.S.C. § 1344	3, 5, 12
Federal Rule of Criminal Procedure 11(c)(1)	2
Federal Rule of Criminal Procedure 32(d)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JAMES P. LeDONNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, James P. LeDonne, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. A, *infra*, at A-1 to 22), *United States v. LeDonne*, is reported at 21 F.3d 1418 (7th Cir. 1994).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 22, 1994. A timely petition for rehearing was denied on July 25, 1994. (App. B, *infra* at B-1). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 11(c)(1)

> (c)(1) Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands the following:
>
> > (1) the nature of the charges to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense. . .

Federal Rule of Criminal Procedure 32(d)

> (d) If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on a direct appeal or by motion under 28 U.S.C. § 2255.

18 U.S.C. § 1343

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money

or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined. . .

18 U.S.C. § 1344

Whoever knowingly executes, or attempts to execute, a scheme or artifice:

(1) to defraud a financial institution; or,

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; . . . .

STATEMENT

1. INTRODUCTION

This Court has long held that a district court must not accept a defendant's guilty plea without first establishing that he is knowingly and voluntarily entering that plea. *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). A defendant lacking an understanding of the charges to which he is acknowledging guilt cannot make such a knowing and voluntary plea. *Id.* District courts therefore must follow specific procedures to ensure the defendants' understanding of the crimes to which they are pleading guilty. *Id.*; FED. R. CRIM. P. 11, 18 U.S.C.

This case requires this Court to ensure that the Seventh Circuit is not allowed to eradicate the *McCarthy* and Rule 11 safeguards with a new, heretofore unknown, expansion of the "totality of circumstances" standard it employs. Up

to now, the Seventh Circuit, following *McCarthy's* lead, held that a district court should thoroughly question a defendant to expose the extent of his understanding of the charged crimes before accepting his guilty plea. *United States v. Fountain*, 777 F.2d 351 (7th Cir. 1985); *also see United States v. Seybold*, 979 F.2d 582 (7th Cir. 1992). The court also held that the adequacy of this questioning, however, could be judged within the context of the "totality of the circumstances" surrounding the plea proceedings: the complexity of the charges, the defendant's ability to understand the charges, whether the defendant is represented by counsel, the court's colloquy with the defendant and the evidence proffered by the government. *United States v. Ray*, 828 F.2d 399, 405 (7th Cir. 1987); *accord, United States v. Musa*, 946 F.2d 1297 (7th Cir. 1991). But, even under this broader standard, the plea proceedings must establish both that the legal charges to which the defendant was pleading guilty were accurately explained and that the defendant, in his own words, expressed understanding of those charges. *Id.*

Here, the Seventh Circuit broke new ground, substantially departing from even its own broad "totality" test, in holding that James P. LeDonne ("LeDonne") entered a knowing and voluntary guilty plea. For in this case, the Seventh Circuit not only acknowledged in its opinion below that the charges against LeDonne were complex, but spent the majority of its opinion simply attempting to accurately define those charges under the facts of this case. Within that context, the Seventh Circuit also acknowledged that the government's proffer inaccurately "blurred" the definitions of those charges. Further, the court conceded that LeDonne's counsel mis-stated the charges to LeDonne when, acting at the district court's request and on its behalf, he questioned LeDonne about

his understanding of the charged crimes. And, as the appellate court also conceded, LeDonne himself never expressed in his own words any understanding of these charges during the plea proceedings.

Extending its "totality" standard to previously uncharted waters, however, the court held that LeDonne's college education, his admission that he had "read" the charges and his out-of-court consultation with his attorney about the charged crimes, showed LeDonne's understanding of the crimes to which he pled guilty, even in the face of direct evidence that LeDonne was both misinformed about the nature of those charges and the complete absence of any testimony from LeDonne that he understood those charges. In so doing, the Seventh Circuit did more than give a reasonable gloss to this Court's seminal *McCarthy* holding, it essentially stripped it of its very meaning.

Absent review by this Court, therefore, plea proceedings within the Seventh Circuit will lose the essential protection provided by *McCarthy* and Rule 11 of the Federal Rules of Criminal Procedure. Moreover, this case will set a dangerous precedent for other circuits.

2. FACTUAL AND PROCEDURAL BACKGROUND

(a) District Court Proceedings

James P. LeDonne was charged with the federal crimes of wire and bank fraud. 18 U.S.C. §§ 1343, 1344 (1992). LeDonne decided to plead guilty to both charges. On July 10, 1992, LeDonne's plea hearing was held in the Northern District of Indiana, South Bend Division, the Honorable Judge Allen Sharp presiding. After advising the government that the two counts contained in the charging information were "fairly complicated," the court directed the government to make its evidentiary proffer as to the

factual and legal basis for LeDonne's guilty plea. (Pl. Tr. 3-4).[1] The government first proceeded with respect to Count I. The government described a scheme in which James P. LeDonne made fraudulent misrepresentations to obtain and purchase vehicles from the related business entities Walden Distributing and Walden Leasing ("Walden"). (Pl. Tr. p. 4). The government charged that LeDonne would telephone Walden and tell them he had the funds to pay for the vehicles he wanted to order from them. (Pl. Tr. p. 6). LeDonne would then send Walden purchase orders via facsimile transmission. (Pl. Tr. p. 7). The government finally told the judge to read the information to obtain further details of the scheme.[2] (Pl. Tr. p. 8). At no time did the government detail the elements of the wire fraud charge contained in Count I.

The government then proffered the following evidence relating to the bank fraud charge contained in Count II of the information. LeDonne owed an Oklahoma automobile dealership $148,000. (Pl. Tr. p. 8). On May 10, 1991, LeDonne opened up a checking account at the Summit Bank in Indianapolis, Indiana in the name of J.P. Distributing, Inc. (Pl. Tr. p. 8). On May 15, 1991, LeDonne's business partner, Paul McClure, opened a checking account at Bank One in Elkhart, Indiana, also in the name of J.P. Distributing, Inc. (Pl. Tr. p. 9). LeDonne wrote a $150,000 check on the Summit account, which McClure deposited in another Bank One checking account held in the name of McClure Enterprises. (Pl. Tr. p. 9). At that time, the Summit bank account did not have sufficient funds to

---

[1] All citations to the Plea hearing transcript will be referred to as "Pl. Tr. p. ____".

[2] The government also described other alleged conduct by LeDonne that the Court did not consider pertinent to Count I. (Pl. Tr. p. 8).

cover this check. (Pl. Tr. p. 9). Immediately thereafter, a $150,000 check was issued from the McClure Distributors' Bank One account for deposit to the J.P. Distributing Bank One account. (Pl. Tr. p. 9).

LeDonne began issuing checks from the J.P. Distributing Bank One account. (Pl. Tr. p. 9). Subsequently, Summit Bank informed Bank One that LeDonne's initial $150,000 check was backed by insufficient funds. (Pl. Tr. p. 9). Bank One ultimately lost $98,000 as a result of the transactions. (Pl. Tr. p. 9).

During its proffer, the government first stated that LeDonne schemed to defraud Bank One, in violation of 18 U.S.C. § 1344(1). (Pl. Tr. p. 8). Later, the government switched fields and stated that LeDonne schemed to obtain money and funds by means of false pretenses, representations and promises in violation of 18 U.S.C. § 1344(2). (Pl. Tr. p. 9). The government never clarified which provision of the bank fraud statute it asserted LeDonne violated under Count II.

At the conclusion of the government's proffer, the district court briefly addressed LeDonne. (Pl. Tr. pp. 12-15). The court never directly asked LeDonne if he understood the nature of the charges against him or the factual bases of the charges. Instead, the court had LeDonne's counsel question LeDonne about the factual bases of these charges on its behalf. (Pl. Tr. pp. 15-16).

LeDonne responded to more than two-thirds of his attorney's questions with mere "yes" or "no" answers. (Pl. Tr. pp. 16-24, 26-35). Some of LeDonne's counsel's questions tracked matters described in the government's proffer. (Pl. Tr. pp. 16-24). However, many matters discussed in the proffer were not covered in the colloquy between LeDonne and his counsel. Critically, during this colloquy,

LeDonne's counsel misinformed LeDonne of one of the elements of bank fraud charge against him contained in Count II. (Pl. Tr. p. 21). Moreover, LeDonne's counsel never advised LeDonne of the elements of wire fraud nor asked him if he intended to defraud Walden, as charged in Count I.

After defense counsel finished, the court again addressed LeDonne. (Pl. Tr. p. 24). The trial judge asked LeDonne about his plea, without referencing any elements or facts related to the charges against him. Again, LeDonne answered these questions with mere affirmative or negative responses. (Pl. Tr. p. 24). Following this brief inquiry, the government supplemented its proffer with additional facts. (Pl. Tr. p. 25). The court did not question LeDonne as to these additional facts.

LeDonne did advise the court that he had read the information. (Pl. Tr. p. 12). LeDonne's counsel advised the district court that he discussed the charges with LeDonne outside of court and that, in his opinion, LeDonne understood them. (Pl. Tr. pp. 35-36). Based upon those two facts, and the above-described plea proceedings, the district court found that LeDonne had knowingly and voluntarily pled guilty to the bank and wire fraud charges contained in the information. (Pl. Tr. pp. 35-36). The district court later sentenced LeDonne to sixty-three months in a federal correctional facility.

(b) Motion to Withdraw

On February 13, 1993, LeDonne moved to withdraw his guilty plea on the grounds that he never understood the nature of the charges against him. (App. A, pp. A-4, 5, n. 1). The district court denied the motion, ruling that

LeDonne's plea was both knowing and voluntary. (App. D., pp. D-2, D-3).[3]

(c) The Decision Below

The Seventh Circuit affirmed, finding that the district court did not abuse its discretion in denying LeDonne's motion to withdraw his guilty plea. In its opinion, the Seventh Circuit detailed the preferred procedure for conducting a Rule 11 plea hearing. (App. A, p. A-9). The prosecutor in its proffer should identify the elements of the charge. (App. A, p. A-9). Subsequently, the district court should question the defendant to determine that he understands the nature of the charge to which he pled guilty. (App. A, p. A-9). The court noted that the district court's procedure here had potential "pitfalls." (App. A., p. A-9).

The court also noted two instances in which LeDonne could have been potentially confused as to the nature of the charges against him. The first instance involved the government's failure to indicate the provision of the bank fraud statute to which LeDonne was pleading guilty, which, in turn, could have potentially blurred the nature of those charges in LeDonne's mind. (App. A, p. A-14). The second instance occurred when LeDonne's counsel inaccurately implied that LeDonne's purpose in issuing the

---

[3] The court noted that LeDonne's testimony indicated he understood the nature of the charges against him, quoting this passage:

> THE COURT: The long and short of it is, with all of this said and done, Mr. LeDonne, you're still pleading guilty of Count I and II of the information.
>
> DEFENDANT: That's correct, Your Honor.
>
> THE COURT: Because you're, in fact, guilty?
>
> DEFENDANT: That's correct, Your Honor.

(Pl. Tr. p. 35).

insufficient funds checks constituted an element of the crime of bank fraud. (App. A, pp. A-14-15).

The court, however, found that, despite these inaccuracies and omissions, the totality of the circumstances in the plea hearing record indicated that LeDonne understood the nature of the charges against him. Specifically, the court found that LeDonne's monosyllabic testimony in response to his attorney's questioning, his reading of the information, his counsel's representations that LeDonne understood the charges, along with the government's proffer, established that LeDonne's plea was voluntary and intelligent. (App. A, pp. A-15, A-21-22).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The *McCarthy* rule, set down by this Court over twenty years ago, makes clear that a defendant cannot enter a knowing and voluntary guilty plea without an adequate understanding of the legal charges against him. And, while district courts have long been allowed to look at the "totality of the circumstances" surrounding a defendant's plea to establish the defendant's understanding of the charged crimes, the presence of such circumstances have never been allowed to outweigh clear evidence that no true understanding existed.

This case raises the important question of whether a trial court can rely solely upon accepted indicia of a defendant's understanding of charged crimes to which he is pleading guilty in the absence of plea proceeding testimony from him that he had such an understanding and in the presence of clear testimony that the charged crimes were never accurately explained to him. Here, the Seventh Circuit, in a substantial departure from *McCarthy*, its own

precedent and that of other circuits, has held that the accepted indicia of a defendant's comprehension of the charged crimes, *alone*, is enough to establish the defendant's requisite understanding to make his plea knowing and voluntary. And, the Seventh Circuit has further held that the existence of such indicia outweighs the accepted fact that the charged crimes were inaccurately explained to the defendant and that the defendant himself never testified to any real understanding of those charges.

A.

THIS CASE RAISES IMPORTANT QUESTIONS ABOUT WHETHER A TRIAL COURT CAN FIND THAT A DEFENDANT TRULY ENTERED A KNOWING AND VOLUNTARY PLEA OF GUILTY WHERE HE ADMITTEDLY WAS MISINFORMED ABOUT THE NATURE OF THE CHARGES AGAINST HIM AND NEVER EXPRESSED ANY UNDERSTANDING OF THOSE CHARGES AT THE PLEA PROCEEDING.

A defendant's plea is not voluntary if he does not understand the law in relation to the facts. *McCarthy, supra* at p. 466. Thus, pursuant to Rule 11, this Court has required that the district court fully advise the defendant of all of the elements of the charges against him. *Id.* at 470-71.

In *McCarthy*, this Court found that the failure to inform the defendant of the intent element of the crime to which he pled guilty established that his plea was neither knowing nor voluntary. *Id.* Since the defendant did not understand the nature of the charges against him, the Court held that Rule 11 was violated. *Id.* at 463-71. Thus, the defendant was allowed to withdraw his guilty plea. *Id.*

Moreover, as specifically recognized by the Fifth Circuit, there is essentially no difference between failing to advise

the defendant of one element of the charges and incorrectly advising the defendant of the nature of the charges. *United States v. Boatright*, 588 F.2d 471 (5th Cir. 1979). In *Boatright*, although the defendant was pleading guilty to a conspiracy charge, the court improperly advised him that his crime was "intentionally engaging in the gun business." *Id.* at 474-75. At no point during the remainder of the proceedings did the court correct this error. *Id.* The Fifth Circuit held that the trial court's failure to properly explain the charges precluded the defendant from ever understanding the nature of the charges against him. *Id.* Thus, the Fifth Circuit held that the defendant's plea was neither knowing nor voluntary and could be withdrawn. *Id.*; *accord United States v. Syal*, 963 F.2d 900 (6th Cir. 1992).

Here, the record indicates that, as in *McCarthy* and *Boatright*, the elements of the charges were not properly explained to LeDonne. In fact, the Seventh Circuit noted that two times during the plea hearing the elements of bank fraud were improperly explained to LeDonne. (App. A at pp. A-14-15). The first time occurred during the government's proffer.[4] The bank fraud statute contains two different provisions under which a person may be convicted, each provision requiring different proofs. 18 U.S.C. § 1344. The government first stated that LeDonne's conduct violated the first provision. (Pl. Tr. p. 8). However, the government stated later that LeDonne's conduct violated the second provision. (Pl. Tr. p. 9). The record is devoid of any attempts by the government or the court

[4] Of course, the government never definitively set out the elements of either wire fraud or bank fraud to LeDonne and the court never questioned LeDonne about the elements of either crime.

to clarify this "blurred" description of the nature of the charges against LeDonne.

This mistake was compounded during the colloquy between LeDonne and his counsel. There, counsel's questions gave LeDonne the impression that one element of bank fraud involved the purpose for which he cashed the insufficient funds checks. (Pl. Tr. p. 21). In its opinion below, even the Seventh Circuit conceded this error created a "potential [for] confusion" which might have prevented LeDonne from understanding the nature of the bank fraud charge to which he was pleading guilty. (App. A, pp. A-14-15).

The Seventh Circuit's finding that LeDonne had an adequate understanding of the crime to which he was pleading guilty, in the face of this evidence, is a significant departure from this Court's *McCarthy* decision, as well as those of other circuits. *McCarthy, supra*; *United States v. Syal, supra*; *United States v. Boatright, supra.*

Realizing the break it was making with *McCarthy* and other established precedents, the Seventh Circuit attempted to validate LeDonne's invalid plea on the basis of his plea proceeding testimony. Here again, however, LeDonne's testimony only serves to establish his requisite understanding of the charged crimes if the Seventh Circuit is allowed to engage in yet another significant departure from *McCarthy* and its progeny regarding the extent to which a defendant's testimony is required to establish his comprehension of the charged crimes against him.

The Seventh Circuit, consistent with this Court's ruling in *McCarthy*, has long held that Rule 11 requires a colloquy between the court and the defendant to expose "the defendant's state of mind on the record" *i.e.* a defendant's plea hearing testimony must establish that he un-

derstands the relevant legal and factual issues surrounding his guilty plea. *McCarthy, supra*; *United States v. Fountain, supra* at 356. The Seventh Circuit has further ruled that the defendant's understanding must be established from the defendant's narrative responses to questions. *Id.*

In *Fountain*, the Seventh Circuit held that affirmative or negative responses to the court's questions do not establish on the record what the defendant understands. *Id.* Instead, the court found that affirmative or negative answers merely denote the defendant's ability to mimic the information or indictment and cannot reveal if he comprehends the nature of the charges against him. *Id.*

The Seventh Circuit reiterated this ruling in *Key v. United States*, 806 F.2d 133 (7th Cir. 1986). There, the court held that, "simple affirmative or negative answers to [the court's] questioning are insufficient to fully elucidate the defendant's state of mind." *Id.* at 138.

These holdings were most recently applied in *United States v. Leung*, 783 F.Supp. 357 (N.D.Ill. 1992). In *Leung*, the defendant's plea hearing testimony was almost exclusively comprised of yes or no answers. *Id.* at 359. The district court allowed the defendant to withdraw his plea, since the plea hearing record failed to show that he understood the nature of the charges against him. *Id.*

Here, the Seventh Circuit relied upon LeDonne's testimony to establish his understanding of the nature of the charges against him. (App. A at p. A-15). However, the plea hearing record shows that LeDonne only gave six answers that could be characterized as narrative responses. (Pl. Tr. p. 16-35). And, none of those responses contained any indication that LeDonne had an understanding of the charged crimes to which he was pleading guilty.

Id. Mostly, these responses constituted nothing more than LeDonne's statement of some of the factual events that occurred as he recalled them. *Id.* Meanwhile, the remainder of LeDonne's testimony, over 45 answers in all, consisted of affirmative or negative answers. (Pl. Tr. p. 16-35) The vast majority of LeDonne's responses were precisely the type of answers the Seventh Circuit held were legally insufficient to determine if a defendant understands the nature of the charges against him. *Key, supra*; *Fountain, supra*; *Leung, supra.* In sum, nothing existed in LeDonne's testimony which, up to now, was viewed as legally sufficient to demonstrate his requisite understanding of the crimes to which he was pleading guilty. *Id.*

This Court's review thus is necessary to prevent the Seventh Circuit, in a manner which clearly departs from the purpose of Rule 11, this Court's *McCarthy* holding and its own long established precedent, from allowing defendants' to plead guilty to serious offenses without ever stating on the record their understanding of those crimes.

B.

THIS CASE RAISES IMPORTANT QUESTIONS ABOUT THE EXTENT TO WHICH A DISTRICT COURT CAN RELY UPON OTHER INDICIA TO ESTABLISH A DEFENDANT'S UNDERSTANDING OF CHARGES TO WHICH HE IS PLEADING GUILTY WHERE HE WAS MISINFORMED ABOUT THE NATURE OF THOSE CHARGES AND NEVER TESTIFIED TO HIS UNDERSTANDING OF THOSE CHARGES.

Faced with the inaccurate explanation of the complex crimes charged here and a record devoid of LeDonne's narrative explanation of his understanding of those charges,

the Seventh Circuit sought to salvage the guilty plea by looking at other indicia of LeDonne's understanding of the crimes to which he was pleading guilty. In so doing, the Seventh Circuit departed significantly from its accepted precedent as to the extent to which a trial court can rely on such indicia to save an otherwise clearly defective plea. This Court must now accept this case to set an acceptable limit on the use of such indicia in order to preclude a complete emasculation of its *McCarthy* holding.

1. Reliance Upon A Government Proffer.

A government's proffer may be considered by the district court as one factor in reaching a decision that the defendant's guilty plea was entered into voluntarily and intelligently. *United States v. Musa*, 946 F.2d 1297, 1302 (7th Cir. 1991); *United States v. Ray*, 828 F.2d 399, 422 (7th Cir. 1987). The Seventh Circuit, however, has long held, and reaffirmed in this case, that the proffer is valueless as an indicia of the defendant's understanding of the nature of the charges against him unless proper procedures are followed in making that proffer at the plea hearing. (App. A, p. A-9 and cases cited therein). First, the government's proffer should begin with a recitation of the *elements of the charges*. (App. A, p. A-9). Then, the *district court* should question the defendant to determine if the understood the charges as explained by the government. *Id.* This procedure insures that it is established on the record that the defendant understood the nature of the charges against him. *Id.*

Moreover, as past Seventh Circuit decisions have established, the defendant must agree with the proffer before it can be considered evidence that he understood the nature of the charges against him. *United States v. Ivory*, 11 F.3d 1411 (7th Cir. 1993); *United States v. Musa*,

supra; *Ray, supra*. For example, in *Ray*, the defendant explicitly admitted that the contents of the government's proffer were true. *United States v. Ray, supra* at 406. The court found that this admission indicated that the defendant understood the nature of the charges as described in the proffer. *Id.*

Likewise, in *Musa*, the defendant stated on the record that he understood the contents of the government's proffer. *United States v. Musa, supra* at 1304. Therefore, the district court properly relied on the proffer to establish that the defendant understood the nature of the charges against him. *Id.*

Finally, in *Ivory*, the government proffered the elements of the charges against the defendant. *United States v. Ivory, supra* at 1416-1417. The district court then specifically questioned the defendant about his understanding about each of the charges against him, with each of the district court's questions beginning with the phrase "Do you understand?" *Id.* at 1417-1418. The defendant responded affirmatively to all of those questions and the court thus held that the proffer was evidence that the defendant's guilty plea was voluntary and intelligent. *Id.*

Here, the government failed to set forth each element of the crimes charged in its proffer. Further, the government mis-stated those elements in its proffer. It also added facts to the proffer *after* LeDonne had already been fully questioned about his understanding of the crimes to which he was pleading guilty.

Moreover, the district court never directly questioned LeDonne about his understanding of the proffer. The plea proceedings are also wholly devoid of any indication that LeDonne expressed any agreement to, or admitted the truth of, any facts contained in that proffer. Nor was

LeDonne ever asked to even address the facts which the government added to its proffer immediately before he pled guilty. The proffer here thus represented a mere reading of the government's factual position in the case and nothing more.

In holding to the contrary, the Seventh Circuit has substantially departed from its own precedent and has jeopardized the safeguards *McCarthy* set in place concerning acceptance of guilty pleas. This Court must now resolve the issue as to when a district court may properly consider a mere reading of a government proffer sufficient evidence to outweigh a mis-statement of the charges to a defendant who expressed no other understanding of the nature of the charges against him during the plea proceedings.

2. Mere Reading Of The Charging Information.

The Seventh Circuit has long held that the defendant's representation that he read the information is not evidence that the defendant understood the nature of the charges against him. *Ray, supra* at 410; *United States v. Wetterlin,* 583 F.2d 350, n.6 (7th Cir. 1978). "[R]eading the indictment clearly does nothing to establish on the record that the court personally determined that the defendant understood the nature of the charges." *Id.* A mere reading of the information fails to set forth on the record "what was [the defendant's] understanding of the charges." *Id.* at 350, n.7. Only in the "simplest of cases" will the Seventh Circuit allow a district court to accept the reading of the indictment or information as evidence that the defendant understands the nature of the

charges. *United States v. Ray, supra* at 406.[5] Moreover, the Seventh Circuit has acknowledged that fraud crimes, precisely such as those present here, must be explained to the defendant. *Id.* Here, the government charged LeDonne with admittedly legally and factually complex fraud crimes. In this context, the Seventh Circuit improperly relied upon LeDonne's mere reading of the information to evidence his understanding of the charges against him. *United States v. Wetterlin, supra.* Moreover, there is nothing in the plea proceedings which establishes that LeDonne gained any understanding of the nature of the charges against him from reading the information. The Seventh Circuit thus placed improper reliance on this factor in finding that LeDonne understood the charges against him. *McCarthy, supra*; *United States v. Fountain, supra.* Here again, this Court must accept review to preclude district court's from allowing a mere reading of the charge to outweigh clear evidence that the defendant never had the charges correctly explained to him and never expressed any understanding of those charges on the record.

3. Out-Of Court Proceedings.

Finally, the Seventh Circuit also has held that the defendant's representations that he discussed the charges with counsel provides no basis for establishing that the defendant's plea was knowing and voluntary. *United States v. Darling*, 766 F.2d 1095, 1099 (7th Cir. 1985). "Rule 11(c)(1) is not satisfied by affirmative answers to the court's inquiries whether the defendant has discussed the charges

[5] Here, the district court clearly did not consider either bank fraud or wire fraud to be the simplest of charges. The judge stated that "this looks fairly complicated." (Pl. Tr. p. 3).

with his attorney and whether the defendant understands the charges." *United States v. Wetterlin, supra* at 350.

The Seventh Circuit's rulings in *Wetterlin* and *Darling* both comport with this Court's ruling that the defendant's understanding of the nature of the charges against him must be based upon the plea hearing record. *McCarthy, supra.* Assuredly, any prior out of court discussions between the defendant and his counsel are not part of the record and are not particularly helpful in determining if a defendant's guilty plea was knowing and voluntary. *Id.*

Here, the Seventh Circuit improperly relied upon LeDonne's counsel's representation that he discussed the charges with LeDonne and that he understood the nature of the charges against him to establish LeDonne's requisite understanding under Rule 11. (Pl. Tr. 35-36). Such reliance runs directly against the Seventh Circuit's own policy to expose the defendant's state of mind, on the plea proceeding record. *United States v. Fountain, supra.*[6] Moreover, under no circumstances should such unreliable out of court, off the record consultations be allowed to establish a defendant's understanding of the charged crimes where, *as here,* he was misinformed as to the nature of these charges in court and on the record. This is especially so where, again as here, the defendant expressed nothing on the record to indicate that he understood the charges to which he was pleading guilty.

By holding to the contrary below, the Seventh Circuit expanded its ever growing "totality of circumstances" standard well beyond this Court's *McCarthy* ruling, its

[6] Particularly in this case, where the Seventh Circuit noted that LeDonne's counsel improperly advised LeDonne of the nature of the charges against him.

own precedent and those of other federal circuits. And, left unreviewed, the opinion below sets a dangerous precedent that essentially strips the *McCarthy* and Rule 11 safeguards previously applied to ensure that no defendant pleads guilty to serious offenses, and subjects himself to serious punishment, without a full understanding of the crimes to which he is pleading guilty. For these reasons, as well, this Court should accept review of this case to correct this significant departure from *McCarthy* and its progeny.

CONCLUSION

For the above reasons, this petition for a writ of certiorari must be granted.

Respectfully submitted,

SHELLY B. KULWIN
Counsel of Record
MICHAEL C. BENNETT
KULWIN & ASSOCIATES
333 West Wacker Drive
Suite 2860
Chicago, Illinois 60606
(312) 641-0300
Attorneys for Petitioner

October 1994

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 93-1548

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES P. LEDONNE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 92 CR 52—**Allen Sharp**, *Chief Judge.*

ARGUED OCTOBER 5, 1993—DECIDED APRIL 22, 1994

Before COFFEY, FLAUM, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* James P. LeDonne appeals from the denial of his motion to withdraw his plea of guilty to wire fraud and bank fraud. LeDonne contends that the district court failed to inform him of the elements of either offense to which he pleaded guilty and that the record demonstrates an inadequate factual basis which cannot support his convictions. In essence, he argues that he pleaded guilty under the misconception that knowingly drafting checks on insufficient funds was enough to establish a scheme *to obtain money or property by means of false or fraudulent pretenses, representations, or promises,* under 18 U.S.C. § 1343 and § 1344 and therefore his plea was not knowingly and voluntarily made.

I. BACKGROUND

A. The Charges

Count I of the two-count information charged that LeDonne had "knowingly devised and intended to devise a scheme and artifice to defraud Walden Leasing and Walden Fleet Group and other dealerships, leasing companies and individual purchasers, of money and property by means of false and fraudulent pretenses, representations, and promises, while knowing that the pretenses, representations and promises were false when made" and had executed the scheme by use of telephone and telefax in violation of 18 U.S.C. § 1343. Count II charged LeDonne with having "knowingly devised a scheme and artifice to defraud Bank One, a financial institution, and to obtain monies and funds owned by and under the custody and control of Bank One by means of false and fraudulent pretenses, representations and promises" in violation of 18 U.S.C. § 1344.

B. The Facts

The facts as summarized by the government at the plea hearing encompass two separate but related fraudulent schemes. Together these transactions formed the basis of the two-count information. LeDonne, a thirty-nine year old businessman, was the incorporator and manager of a number of distributing and leasing companies engaged in the business of buying and selling wholesale and retail vehicles to various leasing companies, dealers, and rental car companies. His position with the various companies authorized him to make deposits in and write checks on several bank accounts in order to manage the financial transactions involved in procuring and distributing vehicles. Between the months of February and July of 1991, LeDonne contacted various companies from his Elkhart, Indiana office, via telephone or telefax to place purchase orders for vehicles. Knowing that there were insufficient funds to pay for the vehicles, he would assure the sellers that he would provide cash payment in compliance with

the purchase agreement. He would then submit payment in the form of an overdraft check and arrange to have the vehicles picked up on a Friday afternoon in order to prevent the seller from confirming whether sufficient funds were available before completing the transaction. When the sellers contacted LeDonne after discovering they had received insufficient funds checks, LeDonne provided ready excuses for the overdraft. He would then sell the vehicles to generate cash knowing, however, that he could not deliver title as the vehicles were not paid for because they had been purchased with overdraft checks. This scheme formed the basis of the charge of wire fraud.

As it became increasingly difficult to support this method of doing business, LeDonne devised a check kiting scheme utilizing various bank accounts throughout Indiana and Michigan. On one occasion, LeDonne owed an automobile dealership approximately $148,000. In an effort to cover the deficit, LeDonne opened an account with the Summit Bank in Indianapolis on May 10, 1991, and had an associate open an account with Bank One in Elkhart, Indiana on May 15, 1991. LeDonne then wrote a $150,000 check on the Summit account to his associate for deposit in a separate pre-existing account at Bank One. His associate then transferred the funds to the new Bank One account and immediately began issuing checks from that account. By the time the check came back from Bank One there were insufficient funds in the Summit account to cover it. As a result of this scheme Bank One suffered a $98,000 loss and LeDonne was charged with bank fraud.

C. The Entry of the Plea

Pursuant to a written plea agreement, LeDonne entered a plea of guilty to the charges of bank fraud and wire fraud. At the plea hearing, the government proffered the evidence it would have produced on the statutory requirement for each count had the case proceeded to trial. The judge questioned the assistant U.S. Attorney during the presentation, focusing on elements of the offenses. The

judge then asked defense counsel to question LeDonne, under oath, regarding the factual basis of the charges. After counsel finished his examination, the judge directly inquired of LeDonne whether he wished to plead guilty to both counts because of his admission that he committed the acts outlined in the information and orally recounted by the government. LeDonne assured the court that this was correct. The government then briefly summarized some additional facts relating to each count. Reading from the written plea agreement which LeDonne acknowledged having understood and signed, the court advised LeDonne again of the rights he was waiving by his plea, including the right to trial, the right to confront witnesses against him, and the right against self-incrimination. LeDonne responded affirmatively when asked whether he understood that he was waiving these rights by pleading guilty. He acknowledged having been informed of the maximum possible penalties for the specific charges to which he entered his plea and about the process of sentencing under the Guidelines. After determining that no threats or promises were made to induce his plea, the court again asked LeDonne whether he wished to persist in his plea because he was in fact guilty of the conduct alleged. LeDonne responded affirmatively, and the court accepted the guilty plea and set the date for sentencing.

D. The Motion to Withdraw the Plea

Prior to the sentencing hearing, LeDonne acquired new counsel and moved to withdraw his plea as not knowingly and voluntarily made. Among other issues raised in his motion, LeDonne claimed that there was not a sufficient factual basis to establish that he intended to defraud either Walden Leasing Company or the bank and that the court failed to adequately advise him of the essential elements of both offenses.[1] Despite acknowledging that his plea of

[1] The government argues that these grounds were raised only in a conclusory manner before the district court and therefore are

(Footnote continued on following page)

guilty was a tactical decision made in order to avoid more severe consequences, LeDonne argued that he did not harbor the intent to defraud as charged. The district court rejected this argument relying on the defendant's affirmative responses at the plea hearing that he was pleading guilty because he was in fact guilty, and denied the motion to withdraw. Memorandum and Order of Feb. 25, 1993, at 2-3. The court then proceeded to sentence LeDonne to sixty-three months' imprisonment to run consecutively to any state sentence. LeDonne appeals only the district court's denial of his motion to withdraw the plea.

II. DISCUSSION

We review the denial of a motion to withdraw a guilty plea within the framework of Federal Rules of Criminal Procedure 11 and 32. Rule 32(d) provides that "if a motion for withdrawal of a plea of guilty . . . is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason." A defendant, however, does not have an absolute right to withdraw his plea of guilty prior to sentencing. *United States v. Groll*, 992 F.2d 755, 758 (7th Cir. 1993). Rather, the decision whether to allow withdrawal of a guilty plea is a matter within the sound discretion

---

[1] *continued*

waived absent plain error. Fed. R. Crim. P. 52(b); *see, e.g., United States v. Quintanilla*, 2 F.3d 1469, 1476 (7th Cir. 1993). The core of LeDonne's motion was that his plea was not knowing and voluntary. One reason clearly presented in his motion was that he did not intentionally defraud Walden Leasing or Bank One. Defense counsel also argued, during the hearing on the motion to withdraw, that there was an insufficient factual basis to support the crimes charged because there was no discussion of intent, an element of both wire fraud and bank fraud. Moreover, the district court's Memorandum and Order of February 25, 1993, identifies the defendant's challenge to the factual basis as one of the issues raised in support of withdrawal. There is therefore ample support in the record to conclude that both Rule 11 challenges were sufficiently preserved for appeal.

of the district court and we will reverse that decision only for an abuse of discretion. *Id.*; *United States v. Saenz*, 969 F.2d 294, 296 (7th Cir. 1992). In reviewing the district court's decision, findings regarding whether the defendant has demonstrated a "fair and just reason" will be upheld unless they are clearly erroneous. *Saenz*, 969 F.2d at 296; *United States v. Ray*, 828 F.2d 399, 422 (7th Cir. 1987), *cert. denied*, 485 U.S. 964 (1988).

Rule 11 is designed to address the issues the district court must review in determining whether "a defendant's guilty plea is a voluntary and intelligent choice among the alternative courses of action open to him." *Saenz*, 969 F.2d at 296. A guilty plea taken without attention being given to the matters set forth in Rule 11 could constitute a "fair and just" reason justifying the request for withdrawal of a plea, and the denial of a motion to withdraw under such a circumstance would be an abuse of discretion. *Id.* Following the format of Rule 11 tends to ensure the accuracy of the plea and to enable a meaningful and expeditious review. *See, e.g., United States v. Price*, 988 F.2d 712, 719 (7th Cir. 1993); *Ray*, 828 F.2d at 404. Yet the failure to comply with the strictures of the Rule is not necessarily fatal. *United States v. DeCicco*, 899 F.2d 1531, 1534 (7th Cir. 1990) (citing *United States v. Frazier*, 705 F.2d 903, 906 (7th Cir. 1983) (per curiam)). Rule 11(h) specifically provides: "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Thus, "in reviewing Rule 11 proceedings, matters of reality, and not mere ritual should control," *Saenz*, 969 F.2d at 296, and "we should not give Rule 11 such a crabbed interpretation that ceremony is exalted over substance." *Ray*, 828 F.2d at 404 (citations omitted). We need only satisfy ourselves, by considering the total circumstances surrounding the plea, that the defendant was informed of his rights and understood the consequences of his plea. *See Price*, 988 F.2d at 719; *DeCicco*, 899 F.2d at 1534.

A. Nature of the Offense and Factual Basis for the Plea

Unless the defendant understands the elements of the crime he is admitting, his plea cannot be said to have been knowingly and voluntarily entered. *United States v. Musa*, 946 F.2d 1297, 1303 (7th Cir. 1991). To ensure that the defendant's guilty plea is knowing, Rule 11(c) requires that a federal court "inform the defendant of, and determine that the defendant understands, . . . the nature of the charge to which the plea is offered." *See United States v. Seybold*, 979 F.2d 582, 586 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2980 (1993). As we have stated in earlier cases the preferred—but not the required—method of satisfying Rule 11(c)(1) is for "the judge to explain the nature of the charge to the defendant either generally or with regard to the specific facts of the case." *Ray*, 828 F.2d at 405. There are, however, a number of techniques utilized by federal district judges to establish that the defendant understands the nature of the charge against him. Thus, rather than require literal compliance with Rule 11(c)(1) this court has adopted a totality of the circumstances approach to determine whether the defendant understood the charges to which he pled. *Id.* Under this approach, we consider the complexity of the charge, the defendant's level of intelligence, age and education, whether the defendant was represented by counsel, the judge's inquiry during the plea hearing and the defendant's statements, as well as the evidence proffered by the government. *Id.*; *Musa*, 946 F.2d at 1304.

We have also adopted a similar approach in reviewing the sufficiency of the factual basis for a guilty plea. *See Musa*, 946 F.2d at 1302. To ensure that the guilty plea has a basis in fact sufficient to constitute the alleged crime, Rule 11(f) provides: "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Although the factual basis is generally supplied by the defendant's admissions, *United States v. Frye*, 738 F.2d 196, 199 (7th Cir. 1984), "Rule 11(f) does not require the district judge

to engage in a colloquy with the defendant to establish a factual basis for a guilty plea. A judge may find the factual basis from anything that appears on the record, which includes the government's proffer." *Musa*, 946 F.2d at 1302 (citation omitted); *see also United States v. Ivory*, 11 F.3d 1411, 1415 (7th Cir. 1993) ("Rule 11 does not distinguish between factual material supplied by the defendant and that supplied by the prosecutor"). "Thus a sufficient factual basis can be found even when the court engages in the most rudimentary questioning of the defendant if the indictment and statement of the prosecution's evidence are sufficiently specific to make clear to the defendant exactly what is being admitted." *Ray*, 828 F.2d at 406 (citations omitted).

The district court did engage LeDonne in a limited colloquy regarding his admission of relevant facts. The court also inquired and received LeDonne's acknowledgment that he had read the information and discussed it with his attorney. When asked by the court whether he had any difficulty understanding the charges, LeDonne responded that he did not. Generally a defendant's independent prior reading of the charges is considered inadequate to ascertain whether he understood the nature of the charges except in the simplest cases, *Ray*, 828 F.2d at 410, but the effort to determine whether LeDonne's plea was knowing was not so limited in this case. The district court directed the assistant U.S. Attorney to explain the government's theory as to each count and to state the evidence it would offer to support those charges. Instead of directly questioning LeDonne to determine if he agreed with the facts as proffered by the government, the court requested that defense counsel examine LeDonne about the facts which formed the basis of his criminal conduct.

District judges throughout this circuit—and indeed throughout the federal system—have used their experience and the guidance of Rule 11 in developing methods to insure that guilty pleas tendered to them are voluntarily and knowingly and intelligently made. With regard to the matters under discussion here, two procedures have proved par-

ticularly successful in achieving the requisite degree of certainty required. Utilizing the prosecutor at a plea hearing to identify for the defendant the elements of the offense charged, followed by inquiry of the defendant by the judge confirming the defendant's understanding of the elements is an effective method for determining that the defendant understands "the nature of the charge to which the plea is offered." Further requiring the government's prosecutor at a plea hearing to orally recount in relevant detail the facts which satisfy the elements of the offense charged, followed by questions from the judge posed to the defendant to confirm the defendant's admission of those facts also is a highly useful method to establish that the defendant has committed a charge to which defendant has pled guilty.

The procedure used in this case to inform the defendant of the elements of the offenses charged and the presentation of the relevant facts supporting those charged offenses was somewhat similar to the procedure outlined above. Here, however, the government did not separately describe the statutory elements and then proceed with a proffer of the facts. Rather, the facts which constituted the elements of the offense were presented by the government with an occasional clarification and highlighting by the judge. With regard to the procedure used for obtaining the defendant's admission of the relevant facts, that task was delegated to defense counsel. The defendant was placed under oath and examined by his counsel regarding the facts relevant to the charged offenses. Both procedures utilized in this case have potential pitfalls, but as the following discussion indicates, we believe that the district court judge's efforts, when coupled with LeDonne's ability to understand the nature of the charges, renders the district court's practice sufficient under Rule 11(c).

B. Bank Fraud

LeDonne argues that the court erred in accepting his plea because the factual basis presented at the plea hear-

ing which suggested that he had *obtained money or property by means of false or fraudulent pretenses* by engaging in check kiting[2] is legally insufficient. The bank fraud statute under which LeDonne was convicted prohibits two distinct but related types of conduct:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representation, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344 (Supp. 1993). Although largely overlapping, a scheme to defraud and a scheme to obtain money by false or fraudulent pretenses are defined in the disjunctive, and thus are separate offenses. *See, e.g., United States v. Doherty*, 969 F.2d 425, 427 (7th Cir.), *cert. denied*, 113 S. Ct. 607 (1992). In applying the disjunctive analysis to bank fraud, courts have required proof of a misrepresentation only to convict for a violation of § 1344(2). *E.g., United States v. Ragosta*, 970 F.2d 1085, 1089 (2d Cir.) (collecting cases), *cert. denied*, 113 S. Ct. 608 (1992).

---

[2] Check kiting involves the knowing drafting and depositing of a series of overdraft checks between two or more federally insured banks with the purpose of artificially inflating bank balances so that checks can be drawn on accounts that actually have negative funds. *United States v. Doherty*, 969 F.2d 425, 428 (7th Cir.), *cert. denied*, 113 S. Ct. 607 (1992). If timed correctly, the bank will be prevented from discovering that the accounts are overdrawn and will be tricked into honoring checks drawn on accounts with insufficient funds. *Id.*; *see also United States v. Frydenlund*, 990 F.2d 822, 824 (5th Cir.), *cert. denied*, 114 S. Ct. 337 (1993). By repeating this scheme over a period of time a person in essence may obtain an interest-free loan.

A conviction under subsection (1), on the other hand, requires proof only of a recognizable scheme formed with the intent to defraud a financial institution. *Id.*; *United States v. Frankel*, 721 F.2d 917, 920 (3d Cir. 1983).

The information charged LeDonne with violations of both § 1344(1) and (2), but described a fraudulent scheme consisting of a bare check kiting operation unembellished by other acts or communications, which offended only subsection (1). In its proffer, however, the government stated that "LeDonne executed the scheme and artifice in order to defraud *and* to obtain money and funds by means of false pretenses, representations and promises, when he was the maker of check number 2002 . . . a check that he knew was drawn on insufficient funds." (Emphasis added). By stating a factual premise that he had obtained money by means of false pretenses, LeDonne claims he was erroneously led to believe that merely drafting insufficient fund checks constitutes a fraudulent representation. We agree that such a belief is clearly wrong. *See Doherty*, 969 F.2d 427-29. According to LeDonne there is no indication in the record that he understood the charge to be otherwise, nor any admission of intent to defraud. Although LeDonne does not appear to dispute that he engaged in check kiting, he argues that merely presenting worthless checks does not constitute a false representation and thus cannot form the basis of bank fraud as charged.

We know from *Williams v. United States*, 458 U.S. 279, 284-85, 102 S. Ct. 3088, 3091-92 (1982), and its progeny that the drafting and deposit of an overdraft check does not constitute a "false statement" because technically speaking a check does not "make any representation as to the state of an account holder's bank balance." *Doherty*, 969 F.2d at 427. Rather, it is merely "an order to the drawee bank to pay a sum certain to the holder." *Id.* It follows therefore that absent other acts or communications of misrepresentation, knowingly drafting and depositing overdraft checks is not an offense under § 1344(2), which prohibits schemes accomplished "by means of false or fraudulent pretenses, representation, or promises." *Id.* at 428. If no

misrepresentation is made under § 1344(2) merely by passing worthless checks then, LeDonne argues, there is nothing left in a bare check kiting operation to establish the fraudulent intent necessary for a scheme to defraud in violation of § 1344(1). Implicit in this argument is that proof of a misrepresentation or false pretense is an element inherent to establishing a "scheme to defraud." However, this argument is clearly foreclosed by *Doherty*. Doherty had engaged in a check kiting scheme to raise capital to invest in the stock market. The investment proved risky and resulted in a loss of over $96,000 to the bank and criminal charges under 18 U.S.C. § 1344 for Doherty. Premised on *Williams*, Doherty argued that one cannot execute a scheme to defraud without making a false statement or misrepresentation of fact because "a false representation or promise is the *sine qua non* of a 'scheme to defraud' under § 1344(1); [and thus], under *Williams*, check kiting is no more a crime under § 1344(1) than it is under § 1344(2)." *Doherty*, 969 F.2d at 429.

The term *scheme to defraud*, however, was broadly conceived to include conduct designed to deceive in order to obtain something of value, which contrary to the defendant's position, may or may not include conduct involving false statements or misrepresentations of fact. *Id.*; *United States v. Hammen*, 977 F.2d 379, 383 (7th Cir. 1992); *Ray*, 828 F.2d at 408 n.8. The aim of the statute is "to punish the scheme to defraud rather than the end result." *United States v. Sanders*, 893 F.2d 133, 138 (7th Cir.), *cert. denied*, 496 U.S. 907 (1990). Put another way, the focus of the offense of a "scheme to defraud" is on the "intended end result, not on whether a false representation was necessary to effect the result." *United States v. Cronic*, 900 F.2d 1511, 1513 (10th Cir. 1990). Thus it matters not whether the fraudulent scheme was accomplished by an affirmative misrepresentation nor whether the fraud succeeded and the victim deceived. *See Sanders*, 893 F.2d at 138; *accord United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987); *United States v. Solomonson*, 908 F.2d 358, 364 (8th Cir. 1990). As long

as the scheme was devised with the intent to defraud, how that intent manifests itself in execution is irrelevant. *See Frankel*, 721 F.2d at 920. Because direct evidence of a defendant's fraudulent intent is typically not available, specific intent to defraud may be established by circumstantial evidence and by inferences drawn from examining the scheme itself which demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension. *Ragosta*, 970 F.2d at 1090 (citing *United States v. Celesia*, 945 F.2d 756, 760 (4th Cir. 1991)); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1400 (9th Cir. 1986) (citing *United States v. Green*, 745 F.2d 1205, 1207 (9th Cir. 1984), *cert. denied*, 474 U.S. 925 (1985)); *United States v. Clausen*, 792 F.2d 102, 105 (8th Cir.), *cert. denied*, 479 U.S. 858 (1986). As such, the execution of the scheme may be relevant to establishing the defendant's specific intent to defraud.

Focusing on whether the execution of a scheme to defraud exhibited an intent to defraud rather than on false statements or misrepresentations of fact, we held in *Doherty* that § 1344(1) "unambiguously encompasses bare check kiting schemes." 969 F.2d at 429. In so holding we joined a number of circuits that have interpreted § 1344(1) to incorporate bare check kiting as a form of bank fraud. *Id.*; *United States v. Stone*, 954 F.2d 1187, 1189-91 (6th Cir. 1992); *United States v. Fontana*, 948 F.2d 796, 802 (1st Cir. 1991); *United States v. Celesia*, 945 F.2d 756, 758-59 (4th Cir. 1991); *United States v. Schwartz*, 899 F.2d 243, 246-47 (3d Cir.), *cert. denied*, 498 U.S. 901 (1990); *United States v. Bonnett*, 877 F.2d 1450, 1454-56 (10th Cir. 1989); *see also United States v. Frydenlund*, 990 F.2d 822, 824 (5th Cir. 1993); *United States v. Sayan*, 968 F.2d 55, 61 n.7 (D.C. Cir. 1992) (collecting cases).

Here the information which charged LeDonne tracked the language of both provisions of the bank fraud statute, as did the government's identification of the offense during its proffer. Because proof of an affirmative misrepresentation is an element necessary only to convict under § 1344(2) use of the *false pretenses* language by the gov-

ernment might have blurred the elements of the offense, and possibly confused LeDonne's understanding of the charge. However, where a statute defines two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count in order to adequately apprise the defendant of the government's intention to charge him under either prong of the statute. *E.g.*, *Fontana*, 948 F.2d at 801. And proof of any one of those acts conjunctively charged may support a conviction. *Stone*, 954 F.2d at 1192; *Celesia*, 945 F.2d at 758-59; *United States v. Bonanno*, 852 F.2d 434, 441 (9th Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989); *Clausen*, 792 F.2d at 104-05. The government's case rested entirely on the passing of worthless checks rather than on separate acts of misrepresentation. Thus, even though both subsections of the statute were identified, the government was not required to prove the elements of both sections to support a conviction for bank fraud.[3] Any reference to *false or fraudulent pretenses, representations, or promises* was therefore unnecessary since the evidence supported a bare check kiting scheme prohibited under § 1344(1).

Another point of potential confusion arose during defense counsel's questioning regarding bank fraud when he asked LeDonne whether the overdraft checks issued from the Bank One account "allowed [him] to obtain either titles or pay for cars that [he] had in [his] possession or had in [his] possession previously." However, what the checks were being used for is irrelevant. Rather, for purposes of bank fraud under subsection (1), only proof that they were knowingly drafted on insufficient funds is required to establish fraudulent intent. Notwithstanding this, LeDonne admitted full knowledge of the check kiting scheme. When

---

[3] The government insists that it was clear to all at the time of the plea hearing that LeDonne did not violate § 1344(2). Any reference to misrepresentations, the government argues, was proffered only to provide a background in order to "sufficiently explain" the circumstances behind LeDonne's scheme to defraud the bank under § 1344(1).

viewed in the totality of the circumstances these discrepancies in defining the elements of the bank fraud charge had relatively minor impact.

As a college graduate, who held a responsible position requiring considerable sophistication, LeDonne's ability to comprehend the nature of the charges does not appear to be in doubt. By signing the written plea agreement, LeDonne acknowledged that he had read a copy of the information, discussed it with his lawyer, and "understood every accusation made against [him] in the case." LeDonne's admissions coupled with the government's proffer and his apparent ability to understand the charges he faced is persuasive support for finding that LeDonne was adequately advised of the nature of the offense.

LeDonne next contends that the factual basis is inadequate because there was no evidence that he admitted an intent to defraud. According to LeDonne, even if check kiting can form the basis of bank fraud, the use of an overdraft check still does not constitute a false representation, and thus mere reliance on the passing of a worthless check is not alone sufficient to establish an intent to defraud. Had the evidence showed only the simple presentation of an insufficient funds check, this might be true. But a scheme to defraud based on a check kiting operation is distinguishable from inadvertently passing a check drawn on insufficient funds. LeDonne has not disputed that he engaged in the practice of floating checks, and so appears to have conceded the sufficiency of the factual basis to support a conviction under § 1344(1). Even absent a concession, there is clear support in the record that a sufficient factual basis was established in compliance with Rule 11(f).

To sustain a conviction for bank fraud under § 1344(1) based on a check kiting scheme, the government is required to prove beyond a reasonable doubt that the defendant engaged in or attempted to engage in a pattern or course of conduct designed to deceive a financial institution with intent to cause actual or potential loss. *Ragosta*,

970 F.2d at 1089. The facts established at the plea hearing meet this requirement. LeDonne engaged in a scheme in which he deposited a check drawn on insufficient funds into a separate account, thereby artificially inflating the balance, and then wrote checks on that account when he knew there were insufficient funds to cover them. Specifically, the government's proffer detailed that LeDonne opened an account with Summit Bank in Indianapolis on May 10, 1991, and drafted a $150,000 check (LeDonne recalled a check of between $148,000-$150,000) to be deposited into a pre-existing account at Bank One in Elkhart. On May 15, 1991, LeDonne had an associate, Paul McClure, open a new account at Bank One in the name of J.P. Distributing and transfer the $150,000 to the new Bank One account. LeDonne began issuing checks on the new account almost immediately, knowing that the account had been artificially inflated because there were insufficient funds in the Summit Bank account to cover the $150,000 check. By the time the $150,000 check was presented for payment at Summit Bank there were, in fact, insufficient funds and Bank One lost approximately $98,000.

When asked directly by counsel, LeDonne responded that he knowingly deposited an insufficient funds check with the intent of artificially inflating the balance in the Bank One account and immediately wrote overdraft checks from that account before the original deposit cleared the Summit Bank.[4] When entering a guilty plea, a defendant's

---

[4] Counsel: At the time you wrote that check, Mr. LeDonne, you were aware there were insufficient funds in that account; am I correct?

LeDonne: That's correct.

Counsel: And you gave this check to Mr. McClure knowing there was insufficient funds and Mr. McClure then addressed other obligations of the entity from a Bank One account; is that correct?

LeDonne: That's correct.

. . . .

(Footnote continued on following page)

voluntary responses made under oath in open court carry a strong presumption of veracity. *Seybold*, 979 F.2d at 587-89 (citing *United States v. McFarland*, 839 F.2d 1239, 1242 (7th Cir.), *cert. denied*, 486 U.S. 1014 (1988), and *United States v. Darling*, 766 F.2d 1095, 1101 (7th Cir.), *cert. denied*, 474 U.S. 1024 (1985)). In fact, "[t]he only rational manner in which a judge may determine whether a plea is knowingly and voluntarily made, is to observe the defendant's demeanor and responses to the court's questions and to rely on the defendant's sworn answers." *Id.* at 587 (quoting *United States v. Ellison*, 835 F.2d 687, 693 (7th Cir. 1987)). We may infer from LeDonne's responses to counsel's questions, combined with the government's statement of the evidence, that LeDonne knew the checks were not backed with sufficient funds. Coupled with the manner in which the banking transactions were carried out—utilizing three different accounts with checks issued immediately upon deposit—there is enough to establish an intent to trick the bank into honoring checks drawn on an artificially inflated account. The execution of the scheme therefore provides sufficient evidence to establish an adequate factual basis of LeDonne's intent to defraud.

C. Wire Fraud

With respect to the charge of wire fraud, LeDonne argues that he was operating under "the misconception that

---

[4] *continued*

Counsel: Again you and Mr. McClure, or at least speaking from your point of view, knew that the checks were not going to clear the Summit Bank and, as a consequence, the Bank One account?

LeDonne: I would like to confer with my counsel.

The Court: All right.

Counsel: Mr. LeDonne, at the time you issued the check to Mr. McClure, you knew that that check was not going to clear Summit Bank, is that correct, there was insufficient funds in that account?

LeDonne: At that particular time, that's correct.

the nature of the offense of wire fraud necessarily included an element that at the time he used the telefax there was insufficient funds in his checking account." He argues that there is no other indication in the record that he admitted to use of a wire transmission to obtain money or property by means of false or fraudulent pretenses, as is required to prove wire fraud.

The wire fraud statute under which LeDonne was charged states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writing, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1343. Like bank fraud, it requires proof of an intent to defraud, which likewise, may be established by circumstantial evidence and by inferences drawn from the facts and circumstances surrounding the scheme. *See, e.g., Clausen*, 792 F.2d at 105; *cf. Ragosta*, 970 F.2d at 1090 (bank fraud). *See generally United States v. Draiman*, 784 F.2d 248, 254 (7th Cir. 1986) (wire fraud is a specific intent crime).

The government's proffer began with: "Mr. LeDonne knowingly devised and intended to devise a scheme and artifice to defraud not only Walden Leasing and Walden Fleet Group but also other dealerships, leasing companies and individual purchasers of money and property by means of false and fraudulent pretenses, representations and promises, knowing that those pretenses, representations and promises were false when made." The fraudulent representation shown was the ordering of vehicles knowing that the representation made regarding payment was false. Specifically, the government stated that in furtherance of

the scheme, LeDonne would assure the sellers that there were sufficient funds to pay for the vehicles by agreeing to send cash or a certified check in compliance with the purchase agreement.[5] However, instead he would dispatch drivers to pick up the vehicles on a Friday, sending along as payment a check knowingly drawn on insufficient funds. The late Friday pick-up was critical to the scheme because it prevented the seller from verifying the sufficiency of the funds with the bank before completing the transaction. Use of the "knowing" and "in furtherance" language by the prosecution refers to LeDonne's attempt to gain the sellers' confidence in order to induce the release of vehicles. Language of this type is considered sufficient to explain the intent element of the offense to the defendant. *See Ray*, 828 F.2d at 409.

Evidence that LeDonne understood the element of intent is clear from his response during his examination by counsel. LeDonne admitted under oath that he faxed the purchase orders with the intent to induce Walden Leasing to provide vehicles, knowing at the time that he did not have sufficient funds to satisfy payment.[6] In fact be-

---

[5] The government proffered: "[I]n furtherance of the scheme, Your Honor, on or about March 21st, Mr. LeDonne, operating under the name J.P. Distributing, and for the purpose of executing this scheme, caused to be transmitted in interstate commerce by means of a wire and telephone communication, in other words, the facsimile, between Elkhart, Indiana, and the facsimile machine of Walden Leasing in Florida." Plea Tr. at 7. "Mr. LeDonne, during this scheme, would indicate that he had funds to pay for these vehicles; he was generally indicating he had cash funds and would be paying for them by certified check." *Id.* at 6.

[6] Counsel: What sort of documents would you use the facsimile machine for specifically with Walden Leasing in Florida?

LeDonne: Walden Leasing would fax me on one side of a document a list of vehicles with VIN numbers, colors, mileage and condition and price, and that list of vehicles would be shipped as soon as the vehicles—as soon as that purchase order was signed and faxed back to Walden Leasing.

(Footnote continued on following page)

cause he knew he could not comply with the terms of the purchase agreement, he arranged to have the vehicles picked up on Friday afternoons in order to conceal the fact that an overdraft check had been submitted as payment. Misrepresenting his financial ability to pay for the vehicles at the time of receipt was fraud. Proof that there were insufficient funds at the time of transmitting the purchase orders and prearranging to take possession of the vehicles when the seller would be unable to verify payment is key to establishing knowledge of his financial wherewithal, which in turn is essential to establishing deliberate misrepresentation. *See, e.g., Bontkowski v. United States*, 850 F.2d 306, 314 (7th Cir. 1988) (discussing *United States v. Bruun*, 809 F.2d 397 (7th Cir. 1987) for the proposition that proof of knowledge is a necessary element of the offense of bank fraud). But it is not the fact of insufficient funds nor the giving of an overdraft check which constitutes a fraudulent misrepresentation. Rather the fraud lies in intentionally misrepresenting his finan-

---

[6] *continued*

Counsel: And you knew at that time on some occasions, in some instances, that you did not have the funds to pay for those vehicles that were being released; is that correct?

LeDonne: That's correct.

Counsel: And you utilized the facsimile machine not only to authorize purchase agreements or transmit purchase agreements, but you also utilized the facsimile machine in a knowing and intentional manner to induce Walden Leasing to release vehicles to you and your corporations?

LeDonne: That's correct.

Counsel: And at that time you, again, were aware that there were insufficient monies to pay for those vehicles at the time of your signing the purchase agreements; is that correct?

LeDonne: Let me confer.

The Court: Certainly.

LeDonne: My answer to his question is yes, that's correct.

cial ability, and was furthered by elaborate efforts to conceal awareness of the insufficiency.

After unsuccessfully negotiating the checks, the sellers contacted LeDonne, who responded to their concerns with ready excuses for the overdrafts. Communications which occur after the defendant has obtained the victims' money or property are in furtherance of the fraudulent scheme if they facilitate concealment or postpone investigation of the scheme. *Sanders*, 893 F.2d at 138; *United States v. O'Connor*, 874 F.2d 483, 486 (7th Cir. 1989). Avoidance of detection is often a material part of a fraudulent scheme; for an illegal scheme would hardly be undertaken were there to be no profit to the plotters. *O'Connor*, 874 F.2d at 486 (citing *United States v. Riedel*, 126 F.2d 81, 83 (7th Cir. 1942)). Attempting to lull the sellers by offering various false explanations for the overdraft is evidence of LeDonne's effort to prevent detection of his scheme and provides further support of his fraudulent intent. In sum, LeDonne's plan, the success of which required carefully orchestrated execution, provides persuasive evidence of his knowledge of wrongdoing, and permits finding a sufficient factual basis for intent to commit wire fraud.

Finally, the court inquired of LeDonne whether he still wished to plead guilty following the government's proffer and after direct questioning by defense counsel. The judge inquired: "You are pleading guilty here after conferring thoroughly and carefully with your lawyer; is that correct?" LeDonne responded: "That's correct, your Honor." The judge further queried: "Your pleading guilty to both counts because you're, in fact, guilty of doing . . . the essential facts that are alleged in that case?" Again LeDonne responded: "That is very correct, your Honor." Later the court again asked: "[T]he long and short of it is, with all of this said and done, Mr. LeDonne, you're still pleading guilty of Count I and II of this information? . . . Because you're, in fact, guilty?" To this the defendant responded: "That's correct, Your Honor." Turning to defense counsel, the judge inquired if counsel could

state to the court that the defendant understood the nature of the charges and the penalties, and was freely, voluntarily, and intelligently entering his plea of guilty to the charges. Assuring the court that he had conferred at some length with LeDonne, counsel represented that the plea was knowing and voluntary. Although a limited exchange with the court, when taken with the government's proffer and LeDonne's responses to counsel's questioning, we think the record provides a sufficient basis to conclude that the requirements of Rule 11(c) were met and that LeDonne was adequately advised of the nature of the offenses of bank fraud and wire fraud and that the factual basis established adequately demonstrates his intent to defraud as to both counts.

III. CONCLUSION

Because we find no abuse of discretion in denying LeDonne's motion to withdraw his plea, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 25, 1994

Before

Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 93-1548 vs.

JAMES P. LeDONNE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 92 CR 52—Allen Sharp, *Chief Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-captioned case, all of the judges on the original panel have voted to deny a rehearing.

IT IS ORDERED that the petition for rehearing is hereby DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA

v. Cause No. SCR. 92-00052(01)

JAMES P. LEDONNE (Name of Defendant) — Gregory K. Blanford, Defendant's Attorney

THE DEFENDANT:

× pleaded guilty to count(s) 1 and 2.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	*Nature of Offense*	*Date Offense Concluded*	*Count No(s).*
18:1343	Wire Fraud	7/1/92	1
18:1344	Bank Fraud	5/31/91	2

Defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

× It is ordered that defendant shall pay to the United States a special assessment of $100.00, for Count(s) 1 and 2 which shall be due with 30 days of this judgment as follows: payable to Clerk, U.S. District Court, 102 Federal Bldg., 204 S. Main St., South Bend, Indiana 46601.

It is further ordered that the defendant shall notify the Clerk, of the United States District Court for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

February 24, 1993
Date of Imposition of Sentence

/s/ Allen Sharp
Chief Judge
United States District Court

February 25, 1993
Date

Defendant's Soc. Sec. Number:
309-64-0427

Defendant's Date of Birth:
September 20, 1954

Defendant's Mailing Address:
Elkhart County Jail
Elkhart, Indiana

Defendant's Residence Address:
50845 Fox Trail Drive
Granger, Indiana 46530

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Sixty Three (63) Months Imprisonment — To run consecutive to any state sentence. This defendant is to receive credit for time served from December 14, 1992 up to the day this defendant is released to state custody.

× The defendant is remanded to the custody of the U.S. Marshal.

RETURN

[Omitted in Printing.]

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) Years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court. If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

× The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

STANDARD CONDITIONS OF SUPERVISION

[Omitted in Printing.]

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	SCR-92-52-1
	)	
JAMES P. LeDONNE	)	

MEMORANDUM AND ORDER

I.

On July 10, 1992, the defendant, James P. LeDonne, entered a plea of guilty to a two-count Information. Mr. LeDonne filed a motion to withdraw this plea of guilty on February 12, 1993. This motion was heard at the time previously scheduled for his sentencing hearing on February 24, 1993.

Mr. LeDonne and his retained counsel, Gregory K. Blanford, raised as issues 1) invalidity of guilty pleas which the defendant entered in Elkhart County, Indiana, on charges which he argues are inextricably tied to the charges against him here; 2) disparity in the government's original sentence calculation with the final sentence recommended in the presentence report; and 3) the "tactical" nature of his guilty plea prevented a full factual basis for the plea.

This court sees Mr. LeDonne's disputes with Elkhart County as matters properly before the Elkhart Superior

Court and not properly addressed here. Therefore, the court will not allow the defendant to withdraw his guilty plea on the basis of this argument. It will, however, omit the Elkhart County convictions from the defendant's criminal history category when determining his sentence.

A defendant has no right to be promised a certain sentence before he pleads guilty. In fact, most written plea agreements, including the one in this case, include language explicitly stating that sentencing determinations are made by the court after the probation office completes its investigation. Mr. LeDonne was properly informed of the maximum sentence he could face on these two counts. He has no basis for withdrawing his guilty plea on this argument, either.

Rule 11 of the Federal Rules of Criminal Procedure requires a judge to make specific inquiries of a defendant in open court to determine whether he knowingly and voluntarily pleads guilty. A very thorough and instructive discussion of the mandates of Rule 11 is found in *United States v. Seybold*, 979 F.2d 582 (7th Cir. 1992). Mindful of *Boykin v. Alabama*, 395 U.S. 238 (1969), this court conducted a very careful examination of James P. LeDonne at his plea hearing on July 10, 1992. *See also Parke v. Raley*, ____ U.S. ____, 113 S.Ct. 517 (1992). His answers, given under oath, several times expressed his voluntary intention to enter a plea of guilty. The court particularly looks to page 35 of the transcript of the July 10, 1992, hearing:

> THE COURT: The long and short of it is, with all of this said and done, Mr. LeDonne, you're still pleading guilty of Count I and II of the information?
>
> THE DEFENDANT: That's correct, Your Honor.
>
> THE COURT: Because you're, in fact, guilty?
>
> THE DEFENDANT: That's correct, Your Honor.

Judge Ripple's opinion in *Seybold, supra* at 587, cites *United States v. Ellison*, 835 F.2d 687, 693 (7th Cir. 1987): "The only rational manner in which a judge may determine whether a plea is knowingly and voluntarily made, is to observe the defendant's demeanor and responses to the court's questions and to rely on the defendant's sworn answers."

This defendant spoke directly to the court at the time of sentencing although he chose not to testify under oath in the hearing on the motion to withdraw his plea. Thus the *only* evidence from this defendant under oath is in the plea proceedings on July 10, 1992. To the extent that his oral unverified statement of fact in court on February 24, 1993 is at odds with his sworn testimony this court will credit the former and not the latter. On the basis of direct observation of the defendant on February 24, 1993, this court has serious reservations as to his credibility and has great difficulty in crediting his most recent statements to this court.

For each and all of the above reasons, the defendant's motion to withdraw his plea of guilty in this court is DENIED.

II.

Count I of the Information against him charged the defendant with wire fraud in violation of 18 U.S.C. § 1343. Count II charged him with bank fraud in violation of 18 U.S.C. § 1344. Since the offenses occurred after November 1, 1987, the Sentencing Reform Act of 1984 and the United States Sentencing Commission Guidelines ("Guidelines"), as amended November 1, 1992, apply to this sentencing.

The defendant, defense counsel, and the government have reviewed the presentence report and the addendum and supplemental addendum thereto, as has the court. The government has no objection. The defendant's numerous objections will be addressed individually.

The government and the defendant have entered into an agreement which provides that the defendant shall be given the minimum sentence available under the Guidelines.

The two counts of conviction are grouped for the purposes of sentencing pursuant to U.S.S.G. § 3D1.2(d). The defendant's base offense level of 6 is found in Guidelines § 2F1.1. This level must be increased by 11 because the losses incurred exceed $800,000.00 (specifically, they total $902,914.75). U.S.S.G. § 2F1.1(b)(1)(J). The defendant objects to the computations which yielded this sum; however, the court has examined the probation officer's calculations and finds them to be reasonable. Two more levels are added under § 2F1.1(2)(B) because the defendant schemed to defraud more than one victim.

The presentence report includes a 4-level adjustment under § 3B1.1(a) for the defendant's organizing a criminal activity involving five or more participants or that was otherwise extensive. The defendant objects to this adjustment. "Otherwise extensive" as defined in Application Note 2 to this section can mean that the defendant "used the unknowing services of many outsiders." In *United States v. Miller*, 962 F.2d 739 (7th Cir. 1992), the court elaborated:

> But there is no prescribed minimum number of persons needed to permit an enhancement under § 3B1.1. All that is required to find that a scheme if "otherwise extensive" is that the defendant directed at least one criminal participant. *United States v. DeCicco*,

> 899 F.2d 1531 (7th Cir. 1990). The involvement of several other knowing and unknowing individuals was a sufficient ground for the district court to find that the scheme was extensive.

962 F.2d at 745. This court finds that Mr. LeDonne did direct another criminal participant, Paul McClure, who was sentenced in this court on October 16, 1992. In addition, he somehow persuaded at least three other people to aid his schemes by opening bank accounts, applying for loans, or making excuses for him to his creditors. The court finds that the defendant used other people sufficiently to qualify his scheme as "otherwise extensive" for sentencing purposes. The four-level increase for role in the offense is imposed.

The presentence report also provides for an increase for obstruction of justice, to which the defendant objects. According to the probation officer, Mr. LeDonne provided materially false information during her presentence investigation of him. *See* U.S.S.G. § 3C1.1, Application Note 3(h). He gave her a financial statement, supported by copies of payroll ledgers, which falsely showed him to have earned $5,000.00 with his father's business. He later admitted that his father had simply given him this money. He asserted in open court that he was told by someone in his father's company that the only way to document this loan (the term used by the defendant in court) was with the type of document he presented to the probation officer.

Care must always be taken to avoid confusing obstruction of justice with a defendant's simple exercise of his rights to not incriminate himself. Obstruction of justice is also more than a defendant's putting up hurdles which merely slow or inconvenience government personnel. Here, however, the defendant took affirmative steps to

mislead the probation officer about the source of his income, forcing her to investigate further in order not only to find the real source but to discredit his information. This court does indeed need accurate financial information in order to sentence the defendant appropriately, and "embarrassment" over taking money from a parent is no excuse for hiding the truth from the probation officer or the court. The court is aware of an opinion which arguably favors this defendant, *United States v. DeFelippis*, 930 F.2d 444 (7th Cir. 1991). There, the defendant claimed to have been employed by a brokerage firm for several months prior to his arrest. In fact, he had been in a training program with the firm and apparently had not been compensated. The Court of Appeals considered the defendant's assertions to be false but not material, as they would not have affected his sentence even if true. This court sees Mr. LeDonne's actions as far more serious than Mr. DeFilippis's. *See United States v. Ojo*, 916 F.2d 388 (7th Cir. 1990). The court finds that Mr. LeDonne has obstructed justice and deserves a 2-point enhancement.

The defendant also objects to the presentence report's failure to award him a reduction for acceptance of responsibility. In fact, he asserts that he should receive the new 3-point reduction available under the 1992 amendments to the Guidelines. Besides his guilty plea, this court has not read anything in the presentence report nor seen anything in the defendant's courtroom demeanor which indicates that he acknowledges the extent of his criminal conduct. In fact, the court observed that the defendant continued to both argue with the charges against him and place blame everywhere but on himself. This court has sentenced many, many defendants and generally grants the 2-level reduction for acceptance of responsibility when there has been a guilty plea. That is not to say that the

court has always been impressed by the sincerity in those defendants' expressions of remorse. "Sorry" is apparently not even in Mr. LeDonne's extensive vocabulary. His offense level will not be reduced for acceptance of responsibility. In so deciding, this court does *not* take into account the defendant's motion and arguments to withdraw his guilty plea.

The defendant has stated other objections which do not directly affect his offense level calculations. First, he protests the paragraphs of the presentence report which tell of his financial dealings with Peggy Miller. Further, he opposes the mention of a current FBI investigation of him. He also objects to his ex-wife's characterization of him. Neither is the defendant happy with the presentence report's explanation of why no home visits have been made by the probation officer. Finally, he objects to the inclusion of victim impact statements as prejudicial.

All of the information objected to by the defendant is either required to be included in the presentence report or is routinely made a part of it. A sentencing court is not restricted to evidence which would be admissible at trial. It may consider any information which has "sufficient indicia of reliability to support its probable accuracy." *See United States v. Marshall*, 719 F.2d 887 (7th Cir. 1983); 18 U.S.C. § 3661, and the Commentary to U.S.S.G. § 6A1.3. Because the rules on admissible evidence are relaxed, and because there is no jury here, the court overrules Mr. LeDonne's objections and considers this information along with all the rest, giving it whatever weight it deserves.

All paragraphs of the presentence report not specifically addressed above are adopted by the court as findings of fact and statements of reasons for imposition of sentence in this case.

The defendant's adjusted offense level is a 25, with a criminal history category of II and an applicable sentence range of 63 to 78 months. This court adopts the agreement of the parties and sentences the defendant to the minimum applicable sentence, a term of 67 months of imprisonment. This term is to be served consecutively to the defendant's state sentences. He is now remanded to the custody of the United States Marshal, who will return him to the custody of the Elkhart County Sheriff. The defendant shall receive credit to his federal sentence for the time he has served in Elkhart County (under a federal detainer). In addition, the defendant shall be on supervised release for a term of 3 years from the date of his release from prison. The court finds that this sentence sufficiently punishes this defendant for his criminal conduct and therefore satisfies the purposes of sentencing as set forth in 18 U.S.C. §3553(a).

The conditions of supervised release shall include the thirteen standard conditions as listed under §5B1.4(a) of the Guidelines.

The applicable fine range is from $10,000.00 to $1,250,000.00. Based on the defendant's financial information, the court imposes no fine. The court must impose a special assessment fee of $50.00 for each count, here totalling $100.00. The court makes no order for restitution.

The clerk shall prepare judgment. The clerk shall also provide a copy of this Sentencing Memorandum to the United States Probation Department for forwarding to the United States Sentencing Commission and to the Federal Bureau of Prisons. The defendant was advised in open court of his right to appeal. IT IS SO ORDERED.

DATED: February 25, 1993

D-9

/s/ Allen Sharp
Chief Judge
Northern District of Indiana

COPY TO:
USA
USM
USP
Blanford
Order Book